[redacted]
RECORD AND 1 BRIEFS.

No. 16-348

SUPREME COURT, U.S.
FILED
DEC 21 2016
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

HENRY E. HILDEBRAND, III
Chapter 13 Standing Trustee
P.O. Box 340019
Nashville, TN 37203-0019
615-244-1101
hank@ch13bna.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
Interest of the *Amicus Curiae*	1
Summary of the Argument	3
Argument	4
I. The bankruptcy system does not preclude enforcement of the FDCPA or other consumer protection statutes in bankruptcy cases	4
A. The Bankruptcy Code does not preclude FDCPA liability based on the filing of an abusive proof of claim	4
B. The FDCPA and other consumer protection laws do not become irrelevant once an individual files bankruptcy	9
II. The Court should not condone the practice of filing proofs of claim for concededly time-barred debts	12
A. The practice exploits weaknesses in the claims-review process	12
B. The practice imposes an unnecessary cost on the system	17
C. The practice can harm debtors	18
D. The potential chilling effect of applying the FDCPA to the claims-allowance process is not a basis for denying enforcement of the law	20
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES

Boyle v. Wells (In re Gustav Schaeter Company), 103 F.2d 237 (6th Cir. 1939) 2

Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991) 7

Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014) 12

Dubois v. Atlas Acquisitions, LLC (In re Dubois), 834 F.3d 522 (4th Cir. 2016) 12

FDIC v. Calhoun, 34 F.3d 1291 (5th Cir. 1994) 7

Green Point Credit, LLC v. McLean (In re McLean), 794 F.3d 1313 (11th Cir. 2015) 6

Heintz v. Jenkins, 514 U.S. 291 (1995) 21

Hope v. Quantum3 Group, LLC (In re Seltzer), 529 B.R. 385 (Bankr. M.D. Ga. 2015) 20

Houston v. Edgeworth (In re Edgeworth), 993 F.2d 51 (5th Cir. 1993) 6

In re Sekema, 523 B.R. 651 (Bankr. N.D. Ind. 2015) 6

In re Vaughn, 536 B.R. 670 (Bankr. D.S.C. 2015) 14, 20

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) 21

Johnson v. Home State Bank, 501 U.S. 78 (1991) 6

Kokoszka v. Belford, 417 U.S. 642 (1974) 9, 10

Law v. Siegel, 134 S. Ct. 1188 (2014) 6

TABLE OF AUTHORITIES – Continued

Page

Miller v. Ameriquest Mortg. Co. (In re Laskowski), 384 B.R. 518 (Bankr. N.D. Ind. 2008).....11

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).....10

Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990).....17

Phillips v. Asset Acceptance, LLC, 736 F.3d 1076 (7th Cir. 2013).....8

Sterba v. PNC Bank (In re Sterba), 516 B.R. 579 (B.A.P. 9th Cir. 2014).....15

Tower Loan of Miss., Inc. v. Maddox (In re Maddox), 15 F.3d 1347 (5th Cir. 1994).....2, 16

Watt v. Alaska, 451 U.S. 259 (1981).....10

White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990).....7

STATUTES, REGULATIONS, AND RULES

11 U.S.C. § 101(5).....17

11 U.S.C. § 101(10).....17

11 U.S.C. § 105.....6, 7

11 U.S.C. § 501(a).....5

11 U.S.C. § 501(b).....5

11 U.S.C. § 501(c).....5

11 U.S.C. § 523(a).....19

11 U.S.C. § 704(a)(5).....16

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 1302 2
11 U.S.C. § 1302(b)(4) 16
11 U.S.C. § 1328(a)(1)-(4) 19
11 U.S.C. § 1328(c) 19
11 U.S.C. § 1328(f) 19
15 U.S.C. § 1692k(c) 21
28 U.S.C. § 586 1
28 U.S.C. § 586(e)(1)(B) 18
28 U.S.C. § 2075 6
50 U.S.C. § 3936(a) 14
12 C.F.R. § 1024.35 11
12 C.F.R. § 1024.36 11
S.C. Code Ann. § 15-3-120 14
Fed. R. Bankr. P. 2004(c) 11
Fed. R. Bankr. P. 3001(c)(3) 13, 14
Fed. R. Bankr. P. 3001(c)(3)(B) 15
Fed. R. Bankr. P. 9011 ..... 6, 7
Fed. R. Bankr. P. 9014(c) 11
Fed. R. Civ. P. 7 5
Fed. R. Civ. P. 11 ..... 5, 6, 8
Sup. Ct. R. 37.2(a) 1
Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Ed Flynn, *Chapter 13 Case Outcomes by State*, Am. Bankr. Inst. J., Aug. 2014 19

Walter W. Heiser, *Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause?*, 76 Mo. L. Rev. 385 (2010) 14

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed. sec. rev. June 7, 2004) 16, 17

Restatement (Third) of the Law Governing Lawyers (1997) 7

INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees (NACTT) is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process, including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Mary Ida Townson, a Chapter 13 Standing Trustee for the Northern District of Georgia and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to prepare and submit this brief on the NACTT's behalf.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13

---

[1] In accordance with Supreme Court Rule 37.2(a), the NACTT states that both the petitioner and the respondent have filed letters with the Court granting blanket consent to the filing of *amicus curiae* briefs. In accordance with Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Tower Loan of Miss., Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *Boyle v. Wells (In re Gustav Schaeter Company)*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the collective interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of funds to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the Bankruptcy Code). *Maddox*, 15 F.3d at 1355.

The NACTT thus has expertise in the bankruptcy law involved in this case. The NACTT's voice is particularly important because Midland's argument relies, in part, on contentions about trustees' duties to object to the allowance of time-barred claims. Midland's theory encourages a practice that significantly

burdens other parties – including chapter 13 trustees – but provides no legitimate benefits.

SUMMARY OF THE ARGUMENT

The Bankruptcy Code does not preclude the application of the Fair Debt Collection Practices Act (FDCPA) to the claims-allowance process in bankruptcy cases. The two statutes easily coexist in this context, with the protections of the FDCPA (applicable to a certain class of creditors and their agents) complementing the general protections under the bankruptcy laws (applicable to all parties). Midland's broader suggestion that consumer protection laws fall away once an individual comes under the protection of the bankruptcy court has troubling implications. Consumer protection laws are often entirely consistent with the bankruptcy laws. Conduct that would otherwise violate these laws should not receive a pass just because it occurs during a bankruptcy case.

Midland asserts that a creditor has a "right" to file a proof of claim even when the creditor agrees that the applicable statute of limitations bars the claim. This practice is just an effort to catch the system in a mistake. Stale claims clearly do slip through; if they never did, creditors like Midland would not bother with the effort. But the truism that human actors will make mistakes is not a complete explanation. Systemic factors are likely at play as well. The multiple parties with authority to object to claims do not provide the

redundant layers of defense that Midland depicts. In fact, the parties' interests rarely align, and the delineation of responsibilities is not always clear. The parties face collective-action and coordination problems, and Midland's practice exploits these problems.

The Bankruptcy Code permits a creditor to file a proof of claim; it does not require it. Because Midland's practice, at best, draws trustees and other parties into a wasteful exercise, the Court should not condone it.

ARGUMENT

I. The bankruptcy system does not preclude enforcement of the FDCPA or other consumer protection statutes in bankruptcy cases.

Midland argues that the FDCPA's regulations of debt collection practices are inconsistent with a creditor's "right" to file a proof of claim and the bankruptcy system's "comprehensive" scheme for governing the relations of creditors and debtors. This argument is wrong in this case and pernicious in its broader implications.

A. The Bankruptcy Code does not preclude FDCPA liability based on the filing of an abusive proof of claim.

Interpreting the FDCPA to prohibit a debt collector from requesting payment in a bankruptcy case on

a concededly stale claim would not conflict with the Bankruptcy Code. The Code does not require a creditor to file a proof of claim, so a debt collector can plainly comply with both statutes by simply electing not to file a proof of claim when doing so would violate the FDCPA.

Midland argues that FDCPA liability would conflict with the "right" to file a proof of claim under § 501(a) of the Bankruptcy Code. *See* 11 U.S.C. § 501(a) ("A creditor . . . may file a proof of claim."). This provision, however, just gives a creditor the power to file a proof of claim, not an absolute right to do so. The significance of the provision is that the creditor has the option not to file a proof of claim. It pairs with subsections (b) and (c), which give other parties, including the debtor and the trustee, the authority to file a proof of claim if the creditor does not. *See* 11 U.S.C. § 501(b), (c).

The permissiveness of § 501(a) thus does not suggest that creditors have license to file proofs of claim when doing so would be improper. Almost the opposite – because the creditor is free under the Code not to file a proof of claim, the creditor bears the responsibility for an abusive filing. Section 501(a) does not insulate a creditor from allegations that its filing of a proof of claim is abusive any more than Rule 7 of the Rules of Civil Procedure (listing pleadings that are "allowed") precludes sanctions under Rule 11 for an allowed but abusive pleading.

If the "right" to file a proof of claim were as broad as Midland contends, it might even undermine the

bankruptcy scheme to combat abuse that Midland argues governs. The right Midland asserts is a statutory right, so if it were absolute, Bankruptcy Rule 9011 would have to yield. *See* 28 U.S.C. § 2075 (providing that rules of practice and procedure "shall not abridge, enlarge, or modify any substantive right").[2] And, similarly, courts would have no ability to impose sanctions for the filing of a proof of claim under § 105 or in exercise of their inherent powers. *See Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) ("[I]n exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions.").

The bankruptcy system's abuse-prevention scheme is not inconsistent with the FDCPA or additional regulations. In fact, the linchpin of the bankruptcy scheme, Bankruptcy Rule 9011, might itself prohibit Midland's practice. *See, e.g.*, *In re Sekema*, 523 B.R. 651, 654-55 (Bankr. N.D. Ind. 2015). Civil Rule 11 is nearly identical, *compare* Fed. R. Civ. P. 11 *with* Fed. R. Bankr. P. 9011, and courts have concluded that, "[w]here an

---

[2] An absolute "right" to file a proof of claim might also suggest a conflict with the discharge injunction when a debtor files a new case. Like many statutes of limitation, the discharge injunction does not fully eliminate a debt. It "extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam*." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991); *see also Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53 (5th Cir. 1993) ("A discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt."). Yet, in most circumstances, the discharge injunction "prohibits filing a proof of claim for a discharged debt." *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1321-23 (11th Cir. 2015).

attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, . . . he makes a claim groundless in law and is subject to Rule 11 sanctions." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991) (footnote omitted); *see also White v. General Motors Corp.*, 908 F.2d 675, 682 (10th Cir. 1990) ("[A]n otherwise time-barred [lawsuit] may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period."); *FDIC v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994) (citing *White* with approval).

The abuse-prevention powers available to bankruptcy courts, which Midland describes as "comprehensive" and incompatible with additional regulations, are in truth very similar to the powers held by most courts. As noted, Bankruptcy Rule 9011 has a nearly identical counterpart in the Federal Rules of Civil Procedure, *see supra*, and in many state-court rules, *see Restatement (Third) of the Law Governing Lawyers* § 110 reporter's note (1997) (listing states with rules similar or identical to Rule 11). Similarly, the inherent power of bankruptcy courts to sanction abuse is a power shared by all federal courts. The one abuse-prevention power that is unique to the bankruptcy system is § 105 of the Code, but that provision just provides general authority to address abuses, nothing that is inconsistent with the enforcement of other abuse-prevention laws.

Midland's argument that the general abuse-prevention powers of the bankruptcy courts preclude

the enforcement of consumer protection measures would be a back-door attack on the broad consensus that filing a lawsuit on a stale debt violates the FDCPA. *See, e.g.*, *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). After all, Rule 11 and similar state rules of civil procedure govern court pleadings. By Midland's thinking, defendants are under the protection of the court system once a complaint is filed and no longer need the protections of the FDCPA. But conduct that would otherwise violate a consumer protection law should not receive a pass just because it occurs during a court case.

That the Code makes the expiration of the statute of limitations a basis for the disallowance of a claim is, similarly, no indication that Congress invited or encouraged a debt collector to assert a claim it knows to be unenforceable. Even if the Code directly prohibited the assertion of a time-barred claim, it would still need a mechanism for disallowing a claim asserted in violation of the proscription. The existence of this mechanism is just evidence that Congress intended parties in interest to have the power to contest distributions on time-barred claims. It says nothing about the propriety of a creditor asserting a claim it agrees is subject to a complete defense.

Interpreting the FDCPA to prohibit debt collectors from asserting stale claims also would not, by itself, imply any conflict with the claims-allowance process. Not all creditors qualify as "debt collectors" under the FDCPA, so the power to disallow a stale claim in

bankruptcy would be relevant even if the FDCPA entirely prevented debt collectors from asserting such claims.

B. The FDCPA and other consumer protection laws do not become irrelevant once an individual files bankruptcy.

Midland suggests that protections under the bankruptcy laws and protections under the FDCPA operate in entirely different spheres, that once an individual comes under the protection of the bankruptcy system, the consumer protections laws like the FDCPA fall away. This theory is not limited to direct statutory conflicts. It is based on the mistaken idea that bankruptcy provides a "comprehensive" system for addressing debtor-creditor relations and that enforcing any general consumer financial protection law in bankruptcy would upset the delicate balance. This approach would remove the protections of remedial statutes even when the statutes are compatible with bankruptcy protections.

The argument draws on a misreading of this Court's statements in *Kokoszka v. Belford*. In that case, the Court examined whether a trustee in bankruptcy was entitled to seize a tax refund derived from the debtor's prepetition tax withholding despite a general federal limitation on the garnishment of "disposable earnings." In assessing the conflict between the bankruptcy law (at that time, the Bankruptcy Act) and the later garnishment statute, the Court noted that

Congress's concern in enacting the garnishment statute "was not the administration of a bankrupt's estate but the prevention of bankruptcy in the first place." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Midland argues that *Kokoszka* implies that the FDCPA does not apply within a bankruptcy case because, like the garnishment law in *Kokoszka*, one of its goals was the prevention of bankruptcy. But the Court's holding in *Kokoszka* implies just the opposite.

The lesson from the decision is one that the Court has emphasized repeatedly – that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). In *Kokoszka*, the Bankruptcy Act was the prior-enacted statute; the Court referred to the nonbankruptcy purpose of the garnishment law in support of its effort to give as much effect as possible to the prior-enacted bankruptcy law. In this case, the FDCPA is the prior-enacted law, so *Kokoszka* supports giving effect to it to the extent possible. That is easily accomplished here. The two statutes present no direct conflict. The FDCPA's abuse-prevention provisions (governing "debt collectors") complement those under the bankruptcy laws (applicable to all parties).

Midland's misreading of *Kokoszka* – its suggestion that consumer protection laws yield to bankruptcy protections – also has troubling broader implications. Consumer protection statutes remain relevant after an

individual has filed a bankruptcy petition. For example, mortgage servicing regulations provide borrowers important tools for resolving questions and disputes. *See, e.g.*, 12 C.F.R. §§ 1024.35, 1024.36. Once a borrower files a bankruptcy petition, the borrower has general powers under the bankruptcy laws for gathering information and resolving disputes, but these powers are not inconsistent with the regulations tailored to mortgage servicing. A debtor, for example, has discovery tools under the bankruptcy rules. *See* Fed. R. Bankr. P. 2004(c) (providing the power to compel the "attendance of any entity for examination and for the production of documents"); Fed. R. Bankr. P. 9014(c) (making many discovery rules applicable in contested matters such as claim objections). The nonbankruptcy laws and regulations, however, remain valuable after a debtor has filed bankruptcy – in some instances, even to bankruptcy trustees. *See, e.g.*, *Miller v. Ameriquest Mortg. Co. (In re Laskowski)*, 384 B.R. 518, 531-32 (Bankr. N.D. Ind. 2008) (holding that a trustee had standing to assert claims under the Real Estate Settlement Procedures Act (RESPA)). Any suggestion by this Court that the bankruptcy system provides a "comprehensive" scheme that is incompatible with other consumer protection or abuse-prevention measures might limit a wide range of rights regularly asserted in bankruptcy cases. *See, e.g.*, *id.* at 528 n.10 ("Courts regularly review debtors' allegations of RESPA violations within the bankruptcy remedial system."). This result would be detrimental, and it is unwarranted by the text of the statutes.

II. The Court should not condone the practice of filing proofs of claim for concededly time-barred debts.

Midland and debt collectors like it regularly file proofs of claim for stale debt. And they seem to have adopted the "sharp practice" of doing so even when they agree that the applicable statute of limitations bars enforcement of the debt. *Dubois v. Atlas Acquisitions, LLC (In re Dubois)*, 834 F.3d 522, 533 (4th Cir. 2016) (Diaz, J., dissenting). Midland's defense is essentially that creditors have a right to see whether their claims will slip through the cracks, as long as they do not affirmatively misrepresent the status of the debt. The Court should not condone this practice.

Part of Midland's argument is that trustees have a duty to object to improper claims if a purpose would be served. This solution is imperfect and wasteful, and its costs ultimately fall to debtors and other creditors. To what end? The only purpose of the exercise is to give Midland and debt buyers like it the opportunity to catch the system in a mistake.

A. The practice exploits weaknesses in the claims-review process.

When a creditor agrees that its claim is unenforceable, the filing of a proof of claim is not a legitimate collection activity. Its only purpose is to exploit weaknesses in the claims-review process. Courts have consistently found that filing a lawsuit on a stale debt violates the FDCPA. *See Crawford v. LVNV Funding,*

LLC, 758 F.3d 1254, 1259 (11th Cir. 2014) (collecting cases). Midland argues that filing a proof of claim in bankruptcy is different because the checks on creditors are greater in bankruptcy cases. Midland, in other words, makes little effort to defend the result a creditor asserting a concededly stale claim seeks: the allowance of an unenforceable claim. Midland's principal argument is that the practice is not abusive because someone is supposed to stop it from succeeding. But the protections against the allowance of stale claims are not perfect.

Contrary to Midland's suggestion, not all proofs of claim present the information necessary for even a basic evaluation of the effect of statutes of limitations. Midland highlights the requirements under Rule 3001(c)(3), but those requirements apply only to proofs of claims based on open-end or revolving consumer credit agreements (other than those secured by the debtor's real property). Fed. R. Bankr. P. 3001(c)(3). Many debts do not fall into this category.

Rule 3001(c)(3), when it applies, requires a creditor to provide information that is often sufficient to identify a defense based on a statute of limitations, information like the date of an account holder's last transaction, the date of the last payment on the account, and the date on which the account was charged to profit and loss. But that means, for those claims, that the debt collector has – or should have – the information it needs to assess the enforceability of its claim itself. That there are bankruptcy remedies, such as claim disallowance, is not dispositive as to whether a

debtor might have an action under a nonbankruptcy law like the FDCPA in addition to the bankruptcy remedies available to the debtor and to other parties, including the trustee. The rule suggests that the Rules Committee thought time-barred claims were slipping past the claims review process due to inadequate information, but its facilitation of the disallowance of these claims is hardly an indication that the Committee believed claimants should be asserting the claims in the first place.

Even when Rule 3001(c)(3) applies, the information a creditor must provide is not always enough to assess the effect of the statute of limitations. Information to establish tolling of the statute of limitations, for example, might not be apparent from the Rule 3001(c)(3) disclosures. *See, e.g.*, 50 U.S.C. § 3936(a) (providing for tolling of statutes of limitations during military service); Walter W. Heiser, *Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause?*, 76 Mo. L. Rev. 385, 385 (2010) ("Most states have legislation that tolls applicable statutes of limitations during the time a defendant is absent from the state."). The same is true of actions that might have revived a statute of limitations. *See, e.g.*, *In re Vaughn*, 536 B.R. 670, 677 (Bankr. D.S.C. 2015) (noting that, under South Carolina law, a borrower may revive a time-barred claim not only by "partial payment of the debt" but also by "some writing signed by the party to be charged thereby.") (quoting S.C. Code Ann. § 15-3-120) (internal quotation marks omitted). Difficult

questions about conflicts of law also inject some uncertainty into the determination of the applicable statute of limitations. *See, e.g.*, *Sterba v. PNC Bank (In re Sterba)*, 516 B.R. 579, 584-86 (B.A.P. 9th Cir. 2014). Without a copy of the agreement between the debtor and the lender – documentation that a creditor on an open-end or revolving debt is not required to provide with the proof of claim, *see* Fed. R. Bankr. P. 3001(c)(3)(B) – trustees and other creditors might lack information required to assess this issue. Because of the asymmetry of information, trustees and other creditors should be able to assume that a creditor requesting distributions from the estate has a good-faith belief that its claim is enforceable, especially when the party filing the proof of claim is a debt collector that is knowledgeable about statutes of limitation.

Filing a concededly time-barred claim takes advantage of the system in other respects as well. The claims-allowance process is, of course, only as good as the human actors involved, and some time-barred claims are no doubt missed as a result of inadvertence. But systemic issues likely contribute to the problem. Midland depicts the multiple parties with authority to object to proofs of claim as redundant layers of protection against the allowance of unenforceable claims. But the other parties' duties and interests rarely align; in fact, trustees and creditors have the most cause to object to stale claims when the debtors' incentives are weakest, and vice versa. The roles of the different parties also can be uncertain, creating the risk that each party will assume that another is responsible.

Chapter 13 trustees do not have the duty to object to time-barred claims in every instance. Trustees have fiduciary duties to the estate, not to any individual party; they are responsible to the creditors collectively. *See Tower Loan of Miss., Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1355 (5th Cir. 1994) ("[T]he chapter 13 trustee serves the interests of *all* creditors. . . .") (emphasis added). And though chapter 13 trustees owe some limited duties directly to debtors, *see, e.g.*, 11 U.S.C. § 1302(b)(4), the trustees are not generally responsible for protecting debtors' individual interests. In fact, trustees are often pitted against debtors in chapter 13 matters.

If a debtor's plan guarantees full payment of unsecured claims, the debtor is the only party affected in any significant way by the allowance of a particular claim. In that situation, the trustee does not have the clear duty to object to a stale claim because no purpose under the trustee's purview would be served. *See* 11 U.S.C. § 704(a)(5) (limiting the trustee's duty to instances in which a "purpose would be served"). But the effect is not limited to full-repayment plans. The same can be true in any plan that guarantees a specific dividend to unsecured claims (as opposed to just a pool of money to be distributed pro rata). And the "predominant form of chapter 13 plan" is a plan that guarantees *both* a minimum pool of money and a minimum percentage dividend to unsecured creditors. Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed. sec. rev. June 7, 2004) § 170.1, at ¶ [9],

www.Ch13online.com. Under such plans, the allowance of a stale claim might principally affect the debtor, even when the dividend is less than 100%.[3]

The trustee's duty is nuanced when the applicable statute of limitations provides only an affirmative defense, without extinguishing debts. The claimant may have a "claim" in that situation, *see* 11 U.S.C. § 101(5), making it a "creditor" under § 101(10) of the Bankruptcy Code. *But see Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) ("The plain meaning of a 'right to payment' is nothing more nor less than an *enforceable* obligation. . . .") (emphasis added). If so, the claimant would be one of the creditors to whom the trustee owes a collective duty. Though a trustee would almost certainly be within his or her rights in objecting to a stale claim, the trustee might have more discretion than Midland suggests.

Trustees also must make practical assessments of the purpose to be served in objecting to a claim. For small claims, the cost of an objection can easily outweigh the harm to the estate that the objection would

---

[3] One advantage of the plan form is that it permits confirmation of the plan before the claims bar date. *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed. sec. rev. June 7, 2004) § 170.1, at ¶ [10]. But this advantage also means that the dividend can control even when it is less than 100%. For example, a plan might guarantee a minimum dividend of 50% and a minimum pool of $5,000 to unsecured claims. If the allowed unsecured claims end up exceeding $10,000, then the dividend would be the determinative number. In that situation, the allowance of a stale claim would increase the amount a debtor would have to pay to complete the plan.

present in the particular case. This effect does not diminish the aggregate harm of these claims, but it creates a friction in the system for preventing it.

B. The practice imposes an unnecessary cost on the system.

Midland's insistence on its right to make other parties object to its claims ignores the question of cost. Trustees and debtors' attorneys may have duties to object to time-barred claims, perhaps motivated by different reasons, but forcing them to perform those duties when the result is a foregone conclusion is not harmless.

Performing the task draws resources from trustees' and attorneys' other duties in the case (and, depending on the debtor's attorney's fee structure, may even have an immediate monetary effect). Even if the effort does not generate a fee specific to the task, the additional work obviously factors into the fees trustees and debtors' attorneys receive. Chapter 13 trustees fund their operations from a percentage commission on payments under the plan. *See* 28 U.S.C. § 586(e)(1)(B). The reasonable expenses of the operation dictate the percentage (up to a cap), so the cost of the exercise Midland and other debt collectors demand affects the fee required to operate trustees' offices. That fee is ultimately borne by the debtors who must pay a higher commission to the trustee and creditors who may receive smaller distributions as a result.

C. The practice can harm debtors.

Midland suggests that the allowance of stale claims does not harm debtors except in the relatively rare cases involving full repayment of unsecured claims. This suggestion understates the potential harm to debtors.

As already noted, the amount a debtor must pay to complete a chapter 13 plan can depend on the allowed claims in *any* plan that guarantees a specific dividend, if the dividend proves to be the controlling number. *See supra* note 3 and accompanying text.

Midland's argument also ignores the reality that many chapter 13 plans do not end in a discharge and that the discharge does not address all claims. In some cases, the discharge is unavailable even if the case completes. *See* 11 U.S.C. § 1328(f). But many chapter 13 cases do not complete at all, even cases that achieve plan confirmation. *See, e.g.*, Ed Flynn, *Chapter 13 Case Outcomes by State*, Am. Bankr. Inst. J., Aug. 2014, at 40 ("If a debtor has a chapter 13 case confirmed, there is a slightly-better-than-even chance that the repayment plan will be completed."). And even when a debtor obtains a discharge, it may not cover all of the individual's debts. *See, e.g.*, 11 U.S.C. § 523(a) (stating exceptions to discharge); 11 U.S.C. § 1328(a)(1)-(4) stating exceptions to the general chapter 13 discharge); 11 U.S.C. § 1328(c) (stating exceptions to the chapter 13 "hardship" discharge). Distributions on stale debts harm debtors directly when they reduce

distributions on claims that remain enforceable after the case ends.

Debtors might even face the misguided argument that the inclusion of a debt in their bankruptcy schedules or disbursements on the debt under a confirmed plan revived the statute of limitations. *See, e.g.*, *In re Vaughn*, 536 B.R. 670, 680 (Bankr. D.S.C. 2015) (rejecting this argument); *Hope v. Quantum3 Group, LLC (In re Seltzer)*, 529 B.R. 385, 395 (Bankr. M.D. Ga. 2015) (same).

Midland argues that its practice benefits debtors by helping to ensure the discharge of time-barred debts when the debtor has failed to schedule them. That argument is entertainingly cynical. The purpose of filing a proof of claim is to request distributions on the claim. Even if the practice occasionally – and, presumably, accidentally – facilitates the discharge of some debts, the effect is almost certainly substantially outweighed by the much more plausible harms to debtors.

D. The potential chilling effect of applying the FDCPA to the claims-allowance process is not a basis for denying enforcement of the law.

Though Midland offers no indication that it believed its claim in this case was enforceable when it filed the proof of claim, it argues that holding it liable might cause creditors that do believe their claims are enforceable to opt out of the claims-allowance process for fear of potential FDCPA liability. These concerns

should not prevent the Court from holding the FDCPA applicable.

The Court responded to similar concerns when it held that the FDCPA applied to attorneys acting as debt collectors by noting that the Act offers protection from liability if the collector "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995) (quoting 15 U.S.C. § 1692k(c)) (internal quotation marks omitted). Even if this defense is not ironclad – courts are divided on its application to errors of state law, *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 580 n.4 (2010) – the potential chilling effect should not prevent the Court from affirming liability.

The Court recently provided a thorough response to similar concerns in concluding that the defense under § 1692k(c) does not apply to errors in the interpretation of the FDCPA itself. *Id.* at 596-605. The Court noted various reasons to discount the concerns about chilling effects from FDCPA liability but, perhaps more importantly, also concluded that any "arguments that the Act strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress." *Id.* at 604. The same is true here. If the FDCPA's provisions have an excessively chilling effect on the filing of proofs of claim, the body to address the problem is Congress.

The practice of filing proofs of claim for concededly time-barred debts serves no valid collection purpose. If the system works as Midland agrees it should, then another party will be forced to expend resources to assert the defense to the claim that the creditor agrees applies. The practice benefits Midland and debt collectors like it only when the system fails. Trying to slip a claim past the claims-review process is just an effort to exploit weaknesses in the system.

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals that the Bankruptcy Code does not preclude an FDCPA claim in the context of a chapter 13 bankruptcy when a debt collector files a proof of claim that it knows to be time-barred.

Respectfully submitted,

HENRY E. HILDEBRAND, III
Chapter 13 Standing Trustee
P.O. Box 340019
Nashville, TN 37203-0019
615-244-1101
hank@ch13bna.com
Counsel for Amicus Curiae